

# Exhibit 28

*State of California ex rel. Ven-A-Care of the Florida Keys, Inc. v.  
Abbott Labs, Inc. et al., Civil Action No. 03-11226-PBS*

**Exhibit to the November 25, 2009 Declaration of Philip D. Robben  
in Support of Defendants' Joint Motion for Partial Summary Judgment**

Rosenstein, Stanley

May 19, 2009

Sacramento, CA

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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IN RE PHARMACEUTICAL INDUSTRY

AVERAGE WHOLESALE PRICE

LITIGATION

-----X MDL No. 1456

THIS DOCUMENT RELATES TO: Civil Action:

State of California, ex rel. 01-12257-PBS

Ven-A-Care v. Abbott

Laboratories, Inc., et al.,

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TUESDAY, MAY 19, 2009

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VIDEOTAPED DEPOSITION OF

STANLEY ROSENSTEIN

--o0o--

Ref. No. 6620

Reported By: CAROL NYGARD DROBNY, CSR No. 4018

Registered Merit Reporter

1 Q. The Court Reporter has handed you a  
2 document that's been marked Exhibit Number -- 6.

3 Please take a moment to review it.

4 Could you describe this document.

5 A. It's a bill analysis done by the  
6 Department of AB 1915 in 2000 of the bill,  
7 original version signed by the then Director of  
8 the Department.

9 Q. Were you involved in preparing this  
10 document?

11 A. I was most likely involved in the review  
12 process.

13 Q. And, according to the summary on the  
14 first page, AB 1915 included, among other things,  
15 a provision requiring the estimated acquisition  
16 costs for production -- prescription drugs be the  
17 direct price for those drugs or Average Wholesale  
18 Price minus 15 percent; correct?

19 A. That's correct.

20 Q. In other words, AB 1915 was -- would  
21 have reduced the reimbursement rate from AWP-5  
22 percent to AWP-15 percent; correct?

1 drugs, and we invited in a number of the  
2 pharmacies to come in and provide us with data,  
3 and I think that's a conclusion that Dr. Gorospe  
4 came away with from the people -- you know,  
5 finally got to agreement and got to actual  
6 pharmacy data in this process.

7 Q. And that was in addition to the data  
8 provided by independent studies that's referred to  
9 here?

10 A. Right.

11 And I -- I think the biggest reference  
12 is, again, this report, Myers and Stauffer.

13 But, as I recall, we were -- seeking,  
14 you know, what are you paying, what is the correct  
15 reimbursement rate, and Dr. Gorospe sat down with  
16 a number of pharmacies and went through that data.

17 Q. And under "Ingredient Costs" about one -  
18 - four bullet points down there's, again, a  
19 reference to a May Revision, and it says "May  
20 Revision proposed to reimburse pharmacies for both  
21 brand and generics drugs for AWP-20 percent based  
22 on information at the time."

1 A. Yeah, that's correct.

2 We went through -- I believe we had a --  
3 one set of proposals in January, I'm not positive,  
4 and then we put in another proposal in May, and  
5 the Legislature asked us to see what we could work  
6 out to -- you know, with the -- with the  
7 pharmacies to come with a -- a final pricing  
8 mechanism, and after lots of consultation with the  
9 pharmacies this was what we proposed, and -- you  
10 know, and it was eventually adopted.

11 Q. And it says -- the following bullet  
12 point, the second sentence says "To continue with  
13 an average AWP-20 percent reduction could affect  
14 access to certain drugs and would  
15 disproportionately affect pharmacies who  
16 specialize in those drugs."

17 He's referring to critical drugs for  
18 AIDS and mental health?

19 A. That's correct.

20 When -- you know, again, you got a  
21 pricing system that's looking at averages, and  
22 what Dr. Gorospe determined was for the AIDS and

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1 A. But I don't know how much --

2 Q. Do you recall, was it maybe 2002?

3 A. I don't recall.

4 Q. Okay. Okay.

5 Are you familiar with the term  
6 "Wholesale Acquisition Cost" or "Wholesaler  
7 Acquisition Cost"?

8 A. I've heard the term.

9 Q. What's your -- what's your understanding  
10 of the term?

11 A. I'm not an expert on it. I -- I don't  
12 know what the definition of it is.

13 Q. Okay. Where did you hear the term?

14 A. Oh, in various discussions with our  
15 pharmacists over the years.

16 MR. CYR: Okay. Would you mark this.

17 What exhibit are we up to?

18 Is it 15?

19 MR. PAUL: 15 would be next, I think.

20 MR. CYR: Would you mark that as Exhibit  
21 15, please.

22 (Exhibit Rosenstein 015 was marked

1 for Identification.)

2 MR. CYR: Take a minute to look at this  
3 document.

4 MR. PAUL: You happen to have a spare?

5 MR. CYR: Yeah. I'm sorry.

6 BY MR. GANDESHA:

7 Q. And, for the record, while you're  
8 reviewing it, this was a document that was  
9 produced to us by the State of California.

10 It's Bates stamped CAAG/DHS-E 0031787 to  
11 31789.

12 Have you had a chance to review the  
13 document?

14 A. Yes.

15 Q. Okay. Do you recognize this document?

16 A. Yeah. It appears to be --

17 Let me just double check the time frame.

18 It appears to be an E-mail that we were  
19 sent by Senate staff related to the May Revised  
20 that proposed a -- the AWP-20 percent asking for  
21 the basis for that proposal.

22 Q. Okay. And in looking down at the bottom

1 of the first page of the document, that's the E-  
2 mail you're referencing?

3 A. Right.

4 Q. Okay.

5 A. And she works for the Senate Budget  
6 Committee and this is Dr. Gorospe's response.

7 Q. Okay.

8 And "she" you're referring to Diane Van  
9 Maren; is that correct?

10 A. Yeah, she's a -- with Senate Budget.

11 Q. Okay. And she's asking for details  
12 about what you had called the "May Revised;"  
13 right?

14 A. That's correct.

15 Q. And that would be a proposed reduction  
16 in reimbursement to AWP-20 percent?

17 A. That's correct.

18 Q. And that would be coupled with an  
19 increase in dispensing fee; is that correct?

20 A. That's correct.

21 Q. Okay. And you forwarded this on to Dr.  
22 Gorospe and Roberto Martinez?



1 A. That's correct.

2 Q. I'm sorry. Go ahead.

3 A. Mr. Martino -- Martinez was the head of  
4 Medi-Cal Policy at the time.

5 Q. Okay. And then you -- the message you  
6 sent Dr. Gorospe and Mr. Martinez -- is it Mr.  
7 Martinez or Dr. Martinez?

8 A. It's Mister.

9 Q. Okay. "But we need to get a response to  
10 this ASAP. I think it's all in your paper.  
11 Please send it to all of us."

12 Did I read that correctly?

13 A. Yes.

14 Q. Okay. And then Mr. Gorospe sends an E-  
15 mail responding to your E-mail and he writes,  
16 "Please review carefully the response on both  
17 portions. I've revised the justification to  
18 reflect newer updated information."

19 Did I read that correctly?

20 A. That's correct.

21 Q. Okay. And then there's an attachment to  
22 this E-mail, and is that the -- is that the paper

1 you referenced in your reference in your message  
2 to Mr. Martinez and Mr. Gorospe?

3 A. That's the paper that Dr. Gorospe had  
4 prepared.

5 Q. Okay. And that paper -- reading the --  
6 the first part of the -- or the first paragraph of  
7 the -- of the third page of the exhibit, the paper  
8 states, "Based on confidential discussions with  
9 providers or individuals who have knowledge of  
10 provider purchasing rates it appears that the  
11 average pharmacy obtains drugs at Wholesaler  
12 Acquisition Cost, WAC, less some percentage that  
13 is based on how quickly they pay their invoices."

14 Did I read that correctly?

15 A. Yes.

16 Q. Okay. That sentence references  
17 confidential discussions with providers or  
18 individuals.

19 Did Dr. Gorospe have those  
20 conversations?

21 A. I believe so.

22 Q. Okay. And then, if you skip down to the

1 -- to the second paragraph, it reads "The  
2 Department obtained WAC prices from the  
3 Department's primary pricing source, First  
4 Databank, to determine the overall relationship  
5 between WAC and Average Wholesale Price, AWP."

6 Did I read that correctly?

7 A. Yes.

8 Q. Okay. And then it goes on to say --  
9 Strike that.

10 Let me ask you, was it your  
11 understanding that WAC prices were available from  
12 First DataBank?

13 A. I don't know. I would have relied on  
14 Dr. Gorospe for that level of detail.

15 Q. Okay. "Based on this information the  
16 Department has determined that AWP is on average  
17 26 percent higher than WAC for brand name drugs  
18 and 350 percent higher than WAC for generic  
19 drugs."

20 It sounds like Dr. Gorospe compared AWP  
21 to WACs and determined the percentage difference  
22 between the two of them; is that correct?

1           A.    Yes, based upon the information he had  
2 just gotten, as he noted.

3           Q.    Okay. Do you understand why he did that  
4 comparison?

5           A.    I believe what he was looking for was,  
6 you know, how to really get to, you know -- you  
7 know, what -- what does the AWP actually  
8 represent, trying to understand, you know, getting  
9 to -- you know, what was the price that the  
10 pharmacists were actually paying for the drugs.

11          Q.    Okay. And -- and the -- jumping back to  
12 the first paragraph on there, he says the -- "It  
13 appears that the average pharmacy obtains drugs at  
14 Wholesale Acquisition Costs less some percentage."

15                Is he comparing the -- the AWP to the  
16 WAC because the WAC was a more accurate statement  
17 of what the pharmacy pays to obtain drugs?

18          A.    I don't know.

19                I think he -- he was looking -- you  
20 know, we were trying to get to the bottom line as  
21 to what were pharmacists really paying to get to a  
22 -- an understandable pricing index, and I believe

1 this was his best effort at the time.

2 You could see it was fairly newly  
3 prepared.

4 As I testified earlier, eventually he  
5 had to sit down with the pharmacies and go through  
6 their data to get to -- you know, really what was  
7 the price that they were paying.

8 Q. Okay. Are you familiar with any other  
9 comparisons of AWP to WAC that were done prior to  
10 this time?

11 A. I don't know.

12 I mean, I'm not. So --

13 Q. Okay.

14 A. I would defer to Dr. Gorospe on that  
15 stuff.

16 Q. Dr. Gorospe proposed using this paper to  
17 support the May Revised, which was the change to  
18 AWP-20 percent; is that correct?

19 A. That's correct.

20 That's providing the explanation on how  
21 we got to both of those numbers.

22 Q. Okay. And how -- how would this -- how